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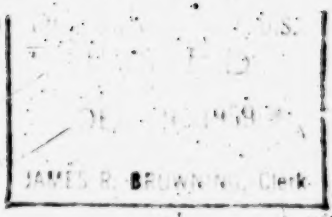

In the Supreme Court

OF THE

United States

October Term, 1939

No. 562

[illegible] Warden of the California State Prison at San Quentin,

Petitioner,

vs.

[illegible],

Respondent.

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit.

[illegible]

[illegible]

[illegible]

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1959

No.

FRED M. DICKSON, Warden of the California State Prison at San Quentin, California,

Petitioner,

vs.

RAYNA TOM CARMEN,

Respondent.

PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit.

Petitioner, Fred M. Dickson, Warden of the California State Prison at San Quentin, California, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above case on September 29, 1959.

OPINIONS BELOW.

The opinion of the Court of Appeals for the Ninth Circuit, printed in Appendix A, is reported at 270 F. 2d ____. The opinion of the United States District Court, which is included in the printed transcript of record, pages 54-76, is reported at 165 Fed. Supp. 942.

The opinion of the California Supreme Court which denied Carmen's petition for a writ of habeas corpus, printed as Appendix C, is reported at 48 Cal.2d 851.

JURISDICTION.

The order of the United States District Court, issuing the writ of habeas corpus and directing release of Carmen from custody, was entered September 12, 1958. This order is printed in the record at pages 76-77. The judgment of the Court of Appeals for the Ninth Circuit affirming the District Court was entered September 29, 1959, Appendix B.

A stay of mandate has been granted pending determination of this petition. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED.

1. Did the District Court have jurisdiction to issue the writ of habeas corpus ordering Carmen's release?

a. Did Carmen's failure to raise the matter—that he was an Indian and the crime occurred in Indian

country—at the proper time under State procedure preclude him from raising the question on federal habeas corpus? Does this failure result in the waiver by Carmen of the federal question? Does this result in Carmen's having failed to exhaust his State remedies within the meaning of 28 U.S.C. §2254?

b. The California procedural rule does not permit a final judgment of conviction to be attacked on habeas corpus upon allegations of new and additional facts claimed to establish lack of territorial jurisdiction, or lack of jurisdiction because of the status of the parties, where there is no defect in jurisdiction appearing on the face of the record and where no exceptional circumstances exist. Is this California procedural rule a violation of due process?

2. Does the federal government have exclusive jurisdiction over a crime committed by a person of Indian descent where the crime occurred on an Indian allotment from the national forest lands?

a. Did Congress intend to create thousands of small islands of exclusive federal jurisdiction throughout the nation by including within the definition of Indian country "all allotments, the Indian title to which has never been extinguished?"

b. Was the locale of the crime, an allotment in trust from the public domain to a relative of the deceased, Indian country within the meaning of 18 U.S.C. 1151?

c. Were Carmen and his victim "Indians" within the meaning of the federal statutes?

d. Do the federal statutes grant the federal government exclusive jurisdiction over crimes in the Indian Country rather than concurrent jurisdiction with the State?

e. Does Congress possess the constitutional power to pass a special penal law which is applicable to the crime and the locale here involved and which excludes application of State laws?[1]

STATUTES INVOLVED.

18 U.S.C. 1151, 63 Stat. 94;
18 U.S.C. 1152, 62 Stat. 757;
18 U.S.C. 1153, 63 Stat. 94;
18 U.S.C. 3242, 63 Stat. 96;
28 U.S.C. 2254, 62 Stat. 967;
28 U.S.C. 2241, 63 Stat. 105.

These statutes are printed in Appendix D.

STATEMENT.

Respondent, Rayna Tom Carmen, is currently confined in the California State Prison at San Quentin on judgments of conviction of first degree murder and assault with intent to commit murder. He was first convicted in the Madera County Superior Court

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[1] The United States Attorney has previously been advised that California questions the constitutionality of the Federal statutes here involved. The United States Attorney has not appeared in the case.

in 1950 of murdering Wilbur Dan McSwain. At his first trial it was alleged and proved that the crimes had been committed in Madera County. On automatic appeal to the California Supreme Court the assault conviction was affirmed and the murder conviction reversed. See *People v. Carmen*, 36 Cal. 2d 768, 228 P. 2d 281.

Carmen was retried in the Superior Court of Madera County and again was convicted of first degree murder for the killing of Wilbur Dan McSwain. It was again alleged and proved that the murder had been committed in Madera County. At the time of the oral argument on the automatic appeal it was suggested for the first time that facts might be produced to show that the crime was committed on a small tract of land which constituted an Indian allotment and that exclusive jurisdiction might be vested in the federal courts. An application to produce additional evidence was denied by the Supreme Court on the ground that its jurisdiction extended only to the record before it. That court then affirmed the conviction of murder in the first degree. See *People v. Carmen*, 43 Cal. 2d 342, 273 P. 2d 521.

The transcript of the second trial in Madera County was filed with the District Court pursuant to *Brown v. Allen*, 344 U.S. 443, and forwarded as an exhibit to the U. S. Court of Appeals for the Ninth Circuit. The transcript has been forwarded to this Court.

Petitioner thereafter commenced habeas corpus proceedings in the California Supreme Court. He contended that he was an "Indian" and that the crime oc-

curred in "Indian country" and that as a result the Madera County Superior Court did not have jurisdiction.

The California Supreme Court appointed a referee. The referee held hearings in Sacramento, Madera, and San Quentin. The reporter's transcript of the oral testimony before the referee was filed in the District Court pursuant to *Brown v. Allen*, *supra*, and pursuant to stipulation. (R 91, R 99-100.) This transcript will hereinafter be referred to as California HCR. The transcript has been forwarded to this Court.

The California Supreme Court denied the writ of habeas corpus on the ground that the matter should have been raised at the time of the trial in the Superior Court of Madera County and that Carmen, having had the opportunity to raise the matter as a matter of defense in the trial court, was precluded from thereafter raising it. That decision is reported as *In re Carmen*, 48 Cal. 2d 851, 313 P. 2d 817 (cert. den. without prejudice 355 U.S. 954). This opinion is printed in Appendix C.

Carmen filed a petition for writ of habeas corpus in the United States District Court. The petition alleged that Carmen was an "Indian" and that the crime occurred within "Indian country," and that therefore exclusive jurisdiction existed in the federal courts. (R 14-15.) The crime was alleged to have occurred on an allotment to one Maggie Jim, the grandmother of the victim. The allotment was made from the public domain, the title being held in trust

by the Federal Government.[2] Carmen also contended that California's procedural rule which required him to raise the matter in the trial court was unconstitutional. (R. 15.)

The Warden filed a return setting up the commitments referred to herein. (R. 34-54.) After oral argument, and filing of written points and authorities, the court entered an opinion and order on September 11, 1958 finding for Carmen and issuing the writ of habeas corpus. (R 54-76.)

An appeal was taken to the United States Court of Appeals for the Ninth Circuit. That court rendered the opinion set out above and appearing in Appendix A.

REASONS FOR GRANTING THE WRIT.

I.

THE OPINION OF THE U. S. COURT OF APPEALS, WHICH ADOPTS THE OPINION OF THE DISTRICT COURT, IS IN DIRECT CONFLICT WITH DECISIONS OF THIS COURT ON THE QUESTION OF "WAIVER" AND "FAILURE TO EXHAUST" STATE REMEDIES; THE OPINION OF THE COURT OF APPEALS COMPLETELY DISREGARDS A REASONABLE STATE PROCEDURAL RULE.

The decision of the Court of Appeals for the Ninth Circuit is in direct conflict with the decisions of this Court. The opinion of the Court of Appeals adopts the opinion of the United States District Court.

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[2] This case presents two questions—the habeas corpus question and the "Indian" question—which turn on very different facts. For clarity, the facts concerning the locale of the crime and the "status" of Carmen as an Indian are stated more fully in the discussion of the Indian question.

That opinion states that the questions concerning federal versus state jurisdiction over the crime were not waived by Carmen's failure to raise them at the trial in the State court, in spite of the fact that the California Supreme Court placed its decision squarely on that ground. (See 48 Cal. 2d 851.) This failure to utilize the available state remedies has also been characterized as a failure to exhaust state remedies within the meaning of Title 28 U.S.C. § 2254.

The opinion of the Court of Appeals is thus in direct conflict with the opinion of this Court. (*Brown v. Allen*, 344 U.S. 443.) In the case of the petitioner *Daniels* this Court in the decision of *Brown v. Allen*, *supra*, stated as follows (pp. 486-487):

> "Finally, federal courts may not grant habeas corpus for those convicted by the state except pursuant to § 2254. . . . We have interpreted § 2254 as not requiring repetitious applications to state courts for collateral relief, p. 413, supra, but clearly the state's procedure for relief must be employed in order to avoid the use of federal habeas corpus as a matter of procedural routine to review state criminal rulings. A failure to use a state's available remedy, in the absence of some interference or incapacity, such as is referred to just above at notes 32 and 33, bars federal habeas corpus. The statute requires that the applicant exhaust available state remedies. To show that the time has passed for appeal is not enough to empower the Federal District Court to issue the writ. The judgment must be affirmed."

Also see the similar language in the same case as follows (p. 503):

"Normally rights under the Federal Constitution may be waived at the trial, *Adams v. United States ex rel. McCann*, 317 U.S. 269, and may likewise be waived by failure to assert such errors on appeal. Compare *Frank v. Mangum*, 237 U.S. 309, 343. When a State insists that a defendant be held to this choice of trial strategy and not be allowed to try a different tack on State habeas, he may be deemed to have waived his claim and thus have no right to assert on federal habeas corpus."

The decision of the Court of Appeals is also in conflict with the decision of *Irvin v. Dowd*, 359 U. S. 394. This Court stated language as follows (p. 406):

"We therefore hold that the case is governed by the principle that the doctrine of exhaustion of state remedies embodied in 28 U.S.C. §2254 does not bar resort to federal habeas corpus if the petitioner has obtained a decision on his constitutional claims from the highest court of the State, even though, as here, that court could have based its decision on another ground. *Wade v. Mayo*, 334 U.S. 672. In this view, we do not reach the question whether federal habeas corpus would have been available to the petitioner had the Indiana Supreme Court rested its decision on the escape ground."

As indicated by the opinions below, the court ignored California's procedural rule and ignored the fact the California Supreme Court expressly and solely placed its decision in the habeas corpus case on the "procedural" ground. In so doing, the Court of Appeals and the United States District Court deci-

sions are in direct conflict with the decisions of this Court.

In discharging the writ of habeas corpus the California Supreme Court determined that a final judgment of conviction cannot be attacked on habeas corpus upon allegations of new and additional facts claimed to establish lack of territorial jurisdiction or lack of jurisdiction because of the status of the petitioner; where there is no defect in jurisdiction on the face of the record and where no exceptional circumstances exist.

This California procedural rule has been short circuited by the Court of Appeals and the District Court. A state prisoner need no longer comply with this State procedural rule. He may, instead, ignore it and proceed to have any federal question heard in the United States District Court.

In reaching this result the United States Court of Appeals and the United States District Court have impliedly held that the State procedural rule is unreasonable and thus a denial of due process.[3] Indeed, such rule is the long-established and widely followed rule in many jurisdictions.

Federal courts as well as state courts follow an identical rule (*e.g.*, see *Toy Toy v. Hopkins*, 212 U.S. 542. (Indian jurisdiction case.) Also see *State v. Utecht*, 220 Minn. 431; 19 N.W.2d 706 (Indian jurisdiction case); *Lehman v. Sawyer*, 106 Fla. 396; 143 So. 310 (territorial jurisdiction).

[3]Carmen so alleged. (R.T. 15.)

The California Supreme Court in the present case simply followed this long-established rule. California simply held that this matter which was in the knowledge of the defendant must be raised at the earliest moment or be deemed waived. This Court in *Brown v. Allen*, 344 U.S. 443, 503, made a similar statement.

Likewise, the opinions of the Court of Appeals and the District Court are in direct conflict with the decision of *Bowen v. Johnston*, 306 U.S. 19. The United States District Court finds exceptional circumstances in the present case. The California Supreme Court under California law determined that no exceptional circumstances existed. The United States District Court's interpretation of the exceptional circumstances doctrine of *Bowen v. Johnston, supra*—a case involving a federal prisoner—is erroneous. It is clear from a reading of the decision of *Bowen v. Johnston, supra*, that the absence of any dispute as to the facts was an important consideration in the case.

II.

THE IMPORTANCE OF THE QUESTION.

The scope of jurisdiction of the U. S. District Court to review state criminal convictions where the petitioner has failed to utilize an available state remedy is a matter which has not been clearly resolved. This question constantly arises in some 75 petitions filed every year in Federal District Courts by California prisoners. Based on the experience in California, this question must arise with great frequency in the 700-

800 petitions filed by the state prisoners in the 86 Federal District Courts. This case will enable this Court to clear up an "untidy" area of the law.[4]

Not only is this a matter of great practical importance for the guidance of United States District Courts in the exercise of their habeas corpus jurisdiction but also it is a problem which stands in the delicate area of federal-state relationships. This problem should be authoritatively determined, not left shrouded in conflict and confusion. We should not have one interpretation of 28 U.S.C. §2254 and the "waiver" doctrine in the Ninth Circuit and a different one in the other circuits.

III.

THE COURT OF APPEALS HAS ERRONEOUSLY DECIDED IMPORTANT QUESTIONS OF LAW CONCERNING JURISDICTION OF FEDERAL COURTS OVER CRIMES COMMITTED BY PERSONS OF INDIAN DESCENT ON INDIAN ALLOTMENTS FROM THE PUBLIC DOMAIN.

Under this heading petitioner proposes to briefly point out important questions concerning federal jurisdiction over crimes committed by Indians on Indian allotments. The facts pertaining to these issues may be summarized as follows:

Carmen, an Indian by descent, shot and killed Wilbur Don McSwain and seriously wounded Alvin McSwain. This shooting occurred in the County of

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[4] See *Sunal v. Large*, 332 U.S. 174, 187 (1947) (Dissenting Opinion). See also Supreme Court 1958 Term—Foreword, Henry M. Hart, Jr., 73 Harv. L.R. 84, pp. 101-121.

Madera, State of California. The referee in the State proceeding determined that the locale of the crime, the McSwain residence, was "Indian country." This determination was based on the fact that McSwain's grandmother had received this land as an allotment from public domain and that the title to this allotment was held in trust by the Federal Government. (HCR 3-4.) This allotment was made out of the National Forest Lands. This land had never previously been set aside as an Indian reservation and there were no Indian reservations in Madera County. (HCR 6-7.) This allotment out of the public domain was surrounded by the National Forest Lands and private holdings. (HCR 133.).

Likewise, this allotment was part and parcel of the community of North Fork. The United States Marshal has never enforced the law in that area. (HCR 53:2, 65.) Carmen had never been advised or controlled by an Indian agent or commissioner. (HCR 65.) The local Justice of the Peace in North Fork has for many years exercised jurisdiction over disputes among the Indians and over misdemeanors. (HCR 57.) The Sheriff has constantly and continually exercised jurisdiction and kept the peace in the community of North Fork, including all Indian allotments. (HCR 73.) Carmen and the other Indians in this community have received all of the benefits of State and local government for many years, including the attendance at State public schools (HCR 129:9), benefits of county and State hospitalization, the benefit of programs of aid to the needy children, aid to the needy blind, and old age assistance (HCR 93, 65).

Carmen had voted in this area, had been in the United States Army, had held various jobs with lumber mills, the utility company and others in the area. (HCR 121-137.)

Carmen was a Mono Indian by descent; however, the descendants of the Mono group of Indians no longer have any tribal organization. They no longer have any chiefs. (HCR 135:21; 105:20.) They have no rules and regulations governing the conduct of any of their members. (HCR 101:12-17; 102-103.) Carmen was unable to state how one ceases to be a member of the tribe. Many of their customs are followed only by the older Indians and not by the younger Indians, including Carmen's generation. The only custom which survives is the burial ceremony. The attendance of this ceremony or participation in it is not compulsory. (HCR 131:16-21.) Carmen and his fellow Indians live in the same manner and mode as other persons in the community.

A. Carmen and his victim were emancipated Indians. They are not Indians within the meaning of the statutes and decisions.

Carmen and his victim were not Indians within the meaning of the federal statutes and decisions. The California habeas corpus proceeding, the transcript of which proceeding is an exhibit in this proceeding, establishes that the Mono Indians have no organization; they have no chiefs, they have no rules and regulations and they impose no sanctions. They are, in fact, less organized than many other racial groups.

There was evidence to substantiate the existence of some customs followed by the Mono Indians. The evi-

dence, however, establishes that these customs were followed primarily by the older Indians. Carmen's generation and the present generation of Mono Indians no longer follow these customs and the only custom of any significance brought out at the hearing before the Referee in the State habeas corpus proceedings was the burial custom. Attendance at this ceremony was not required.

Neither Carmen nor his victim were ever controlled or supervised by any Indian organization or by the Bureau of Indian Affairs. Carmen was partially educated in the State public schools.

The record establishes that Carmen was partially educated in the State public schools (HCR 129:18), was committed to a State hospital (HCR 121:7), served in the U. S. Army (HCR 123:3), draws disability pay from the Bureau of Veterans Affairs (HCR 137:20), voted (HCR 131-132), and was employed in various occupations in and around North Fork, Madera County (HCR 132:16). He was subject to no restrictions on account of his race, legal or otherwise. (HCR 106-107.) He was free to do as he pleased within the limits of the law without interference by the "tribe". (HCR 102.) He was thus emancipated within legal contemplation.

B. The opinions below were in error in determining that an allotment from the public domain is Indian country.

Section 1151 U.S.C., Title 18, defines Indian country to include "all Indian allotments, Indian titles to which have not been extinguished." In arriving at its conclusion that this includes all Indian allotments held

in trust by the Federal Government, the Court of Appeals and the District Court totally ignored 120 years of legislative and judicial use of the phrase "all Indian allotments, *Indian titles to which have not been extinguished*".

The phrase "Indian Title" originally referred to land over which the Indians had uninterrupted use and occupancy. However, *Donnelly v. United States*, 228 U.S. 243, held that statutorily recognized reservations constituted Indian country as well as did the lands to which the Indians retained their original right of use and occupancy. The decisions almost totally ignore these long-established meanings of the phrase "Indian Title".

The conclusion of the District Court is contrary to the language of *Tooisgah v. U. S.*, 185 F.2d 93 at 98. Likewise, the conclusion is contrary to the import of House Report No. 308, 80th Congress, page 492, which states that Indian allotments were included in the definition of Indian country on the authority of *United States v. Pelican*, 32 U.S. 442.

The subsection of 18 U.S.C. 1151 under discussion was intended to *codify* the Pelican rule, *not extend it*.

C. The Federal statutes do not warrant the interpretation that the federal government has exclusive jurisdiction in the Indian country.

The words "sole and exclusive" (18 U.S.C. 1152, 1153, 3242) do not apply to the jurisdiction extended over the Indian country, but are only used in the description of the laws which are extended to it. (*In re Wilson*, 140 U.S. 575; cf. *United States v. McBrat-*

ney, 104 U.S. 621; *Draper v. United States*, 164 U.S. 240.)

D. The federal government and the State of California have concurrent jurisdiction as to certain crimes committed in "Indian country".

There is nothing in the federal statutes which precludes a state from exercising criminal jurisdiction over the same criminal act. See *United States v. McGowan*, 302 U.S. 535, which disclaims exclusive jurisdiction. See, also, *Donnelly v. United States*, 228 U.S. 243, which upholds federal jurisdiction against an argument that the state had exclusive jurisdiction. That case, however, does not claim exclusive jurisdiction in the federal courts.

E. The present case will give this Court an opportunity to re-examine the doctrine of United States v. Kagama; the applicable statutes are unconstitutional as interpreted and applied by the District Court in the circumstances of the present case.

1. Congress does not possess constitutional power to pass a special penal law which applies to California Indians and which excludes application of state law.

The federal statutes, 18 U.S.C. 1151-1153, 3242, interpreted as granting exclusive jurisdiction over the crime in this case to federal courts, are unconstitutional.

Although the federal government may have *concurrent* power, it cannot assert exclusive power over a crime committed by a person of Indian descent, who is subject to no federal restrictions, who lives where he wishes, who is entitled to the full protection of California law, and where the crime is committed on

land allotted to an Indian out of the national forest, over which California has never ceded jurisdiction.

There are two possible grounds for ousting the State of California from jurisdiction over the crime of murder.

The first ground is that the federal government has exclusive territorial jurisdiction, e.g., a cession by the state or a military enclave. This is not such a case; California has never ceded jurisdiction over the land concerned in this case.

The only other ground for excluding California from jurisdiction is that California, by exercising criminal jurisdiction, is interfering with a federal function. Federal power over Indians rests on peculiar historical circumstances which no longer exist.

There are four possible sources of federal power over Indian affairs. These four are as follows: (1) the power to make treaties, Art. II, §2, United States Constitution, (2) the power to regulate commerce "with the Indian tribes," Art. I, §8, United States Constitution, (3) the power to regulate the use of federal property, Art. IV, §3, (4) the power to protect "wards" of the federal government. *United States v. Kagama*, 118 U.S. 375. Also see *Williams v. Lee*, 358 U.S. 213, 79 S.Ct. 296, 3 L.Ed. 2d 251.

The treaty power has been the basis for many decisions concerning Indian affairs. However, there has never been a treaty between the federal government and any California tribe of Indians.

The decisions of this Court reject the second and third possibilities as a source of power to punish

Indian crimes generally. See *United States v. Kagama*, 118 U.S. 375.

The *Kagama* case bases federal power over Indians upon a wardship theory, 118 U.S. at 383. The statements made to support the *Kagama* case are no longer true today. This doctrine is in need of reexamination. There have been no recent cases discussing this point. The opinion in *Williams v. Lee*, 358 U.S. 217 at 223 clearly indicates that the decision rests upon the existence of a treaty with the Navajo Indians (221-223). The present case involves no treaty.

2. **Assuming that Congress possesses constitutional power to enact a penal law which is applicable to California Indians, but not other California citizens, nevertheless, this Court should consider whether or not the statute as here applied is unreasonable.**

The opinion of *Perrin v. United States*, 232 U.S. 478 at 486, stated that the federal "power is incident only to the presence of the Indians and their *status* as wards of government, it must be conceded that it does not go beyond what is reasonably essential to their protection, . . . and must be founded upon some reasonable basis."

In the present case there are two factors which when combined make the statute as applied unreasonable. Here we have a person who may live where he pleases. He does not live on a reservation. He is subject to no control by an Indian commissioner (HCR 65); subject to no control by the tribe (HCR 101-103, 131). He is competent to contract. Defendant, in short, is subject to no restrictions on account of his race. He is an emancipated Indian. The relationship

between Carmen and the federal government is based upon his racial descent only.

Also, the locale of the crime was an allotment from the public domain. The allotment was never a part of a reservation or Indian community. It is in fact surrounded by residences of non-Indians, as well as Indians (11CR 133), the public domain, private holdings, and resorts.

This Court should determine whether or not the application of a federal penal statute, to the exclusion of a state statute, to an offense committed by this emancipated Indian in this locale is unreasonable and thus unconstitutional.

F. The importance of the "Indian" questions.

The proper definition of the phrase "the Indian titles to which have never been extinguished" is an important question in California as well as the rest of the states. There are two basic types of allotments, allotments from the public domain and allotments from Indian reservations. There are 905,037 acres of land allotted from public domain in the United States. There are 11,728,548 acres of land allotted from Indian reservations in the United States. There are 56,325 acres of land allotted from the public domain in California. There are 53,750 acres of land allotted from Indian reservations in California. *House Report 2503*, 82nd Congress, Second Session, pages 67 and 72.

Certainly Congress did not intend to scatter islands of exclusive federal jurisdiction throughout the national forests and throughout a community such as

North Fork, where the Indians live on their allotments in areas surrounded by non-Indians.

Since the 1953 legislation there is no question as to California's jurisdiction over crimes in the Indian country. However, "Indian country" as defined by 18 U.S.C. 1151 is used by Congress in other statutes concerning Indian affairs, for example, Indian liquor legislation.

This Court has not reexamined the wardship doctrine for many years. The court should take this opportunity to determine the power of Congress over Indian affairs in the absence of a treaty or any other power specifically granted Congress by the Constitution.

CONCLUSION.

It is respectfully submitted that the petition for writ of certiorari be granted.

Dated, San Francisco, California,
December 2, 1959.

STANLEY MOSK,
Attorney General of the State of California,
ARLO E. SMITH,
Deputy Attorney General of the State of California,
Attorneys for Petitioner.

(Appendices "A", "B", "C" and "D" Follow.)